



# **BDCP: Permit Application Approach for Conservation Measure 1**

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## **Background**

The Bay Delta Conservation Plan (BDCP) is a Habitat Conservation Plan (HCP) and a Natural Community Conservation Plan (NCCP) being developed to promote the recovery of endangered, threatened and sensitive fish and wildlife species and their habitats in the Sacramento-San Joaquin Delta in a way that will improve reliability of water exports.

The goal of the BDCP is to construct a new water conveyance system that will minimize the effects of the State Water Project (SWP) project pumping while enhancing the Delta ecosystem. The plan will propose new operating criteria for water export out of the Delta from pumping facilities to water users. In addition to new diversion and conveyance facilities and modifications to the existing SWP, the BDCP proposes significant restoration of aquatic habitat to support productivity of native fish populations. If approved by U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries (NMFS), the BDCP would provide the basis for permit issuance under Section 10 of the Endangered Species Act (ESA) for covered activities, including continued operation of existing water export facilities and construction and operation of new export facilities in the Delta. The BDCP would also provide the basis for the issuance of a biological opinion and incidental take statement by the Services for the Bureau of Reclamation's actions within the Delta.

A joint Environmental Impact Report/Environmental Impact Statement (EIR/EIS) is being prepared for the BDCP under the California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA). The CEQA lead agency is California Department of Water Resources (DWR) and the NEPA lead agencies, serving jointly, are the Bureau of Reclamation (BOR), USFWS and NMFS. The Lead Agencies intend for the BDCP EIR/EIS to be a project level document for the purpose of supporting the issuance by the state and federal fish and wildlife agencies of take authorizations. It will also serve as a programmatic document for the actions set out in the BDCP and provide project-level detail for the proposed construction of a new SWP north of Delta intake facilities and conveyance and the operations of new intakes and existing SWP facilities, known as Conservation Measure 1 (CM1). The Corps agreed to be a cooperating agency on the EIS in November 2008.

The Corps will likely have jurisdiction over some actions associated with the implementation of some BDCP covered activities under Section 404 of the Clean Water Act (CWA 404), 33 U.S. Code 1344, and Sections 10 and 14 of the Rivers and Harbors Act of 1899 (RHA 10 and 14), 33 U.S. Code 403 and 33 U.S. Code 408. Actions that involve a discharge of dredged or fill material in waters of the U.S. under CWA 404 and/or structures or work located in, on or over navigable waters under RHA 10 require a Department of the Army (DA) permit under the Corps' Regulatory Program, which is administered by the District's Regulatory Division. For actions that affect Federal projects, permission under RHA 14, also known as "Section 408," is required. Section 408 is administered by or processed through the District's Operations Branch depending on the type of action. Because the Corps' jurisdiction and scope is not the entire BDCP, the Corps will not make one permit decision on the BDCP as a whole. Instead, the Corps may have jurisdiction over the implementation of some of the BDCP covered activities and/or conservation measures such as CM1. These actions will require Corps authorizations under CWA 404 and RHA 10 (also referred to as the 404/10 process) and/or Section 408.

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The proposed schedule of BDCP permit/permission process proposed by DWR is as follows:

- Late 2013 — Completion of BDCP Final EIR/EIS
- Early 2014 — Record of Decision (ROD) approved by BOR, USFWS and NMFS
- Early 2014 — Permit Application for all CM1 components (e.g., intakes, pipeline, or canal, forebays and associated infrastructure for components parts) submitted to Corps.
- Late 2014 — Application(s) for CM1 components submitted to Corps for Section 408 as needed (30%-65% site specific engineering designs must accompany the initial application)
- Mid 2015 — DWR completes final engineering designs (100%) for CM1
- Late 2015 through 2018 — Corps issues Section 408 permissions and 404/10 permits for all CM1 phases.

This proposed schedule is dependent on several factors, many of which are beyond the control of the Corps. Due to the level of complexity, amount of technical data needed to support engineering and design, and the potential for litigation and controversy associated with the BDCP the timeline may change. The Sacramento District continues to meet, consult, coordinate, and cooperate with DWR and other Federal agencies to ensure all parties understand the necessary requirements for Corps authorization.

### **Permit Application Approach for Conservation Measure 1 (CM1)**

#### **Programmatic BDCP FEIS**

As a cooperating agency in the preparation of the BDCP EIR/EIS, the Corps will provide input to the Lead Agencies so that the EIR/EIS can be used by the Corps to the maximum extent possible to make future permit decisions. The EIR/EIS will address how the Corps intends to use the document and what activities may require authorization under Section 408 and/or CWA 404/RHA 10. For components of CM1, the intakes and some of their associated infrastructure will likely require permission under 408 and permits under 404/10. The EIR/EIS will acknowledge the Corps' plans to adopt the FEIS/EIR to make regulatory decisions under Section 408 and CWA 404/RHA 10.

#### **Programmatic ROD for CWA 404/RHA 10 Process**

After the completion of the BDCP EIR/EIS, if there are no unresolved issues, the BOR, USFWS and NMFS will sign RODs and USFWS and NMFS will issue permits under Section 10 of the ESA. At that time, the Corps plans to adopt the EIR/EIS, consistent with the requirements of 40 C.F.R. §1506.3, and complete a ROD addressing its statutory requirements and covered activities that fall under the Corps' jurisdiction. The Corps' findings in the ROD would include: (1) using the EIS/EIR to facilitate future permit decisions, noting subsequent NEPA analysis may be necessary and (2) using the alternatives in the EIS/EIR and associated analysis for CM1 to provide a context for the practicable alternatives that would be evaluated under the 404(b)(1) guidelines. The ROD would also discuss the permit review process for CMs, including the specific permitting approach ("phases") for CM1. Because the EIS/EIR will not provide sufficient engineered designs, no findings for Section 408 would be made in the ROD. However, the ROD may articulate the status and timing of BDCP engineering design and potential Section 408 actions.

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## **Complete Application for CWA 404/RHA 10 DA Permit**

DWR will submit a complete application for a DA permit under CWA 404/RHA 10 for CM1 after the EIR/EIS ROD is signed. To be determined complete, the application must include detailed project information, including CM1 operations, in accordance with 33 CFR 325.1(d). Based on BDCP project-level information, the application will set out project "phases" designed to align the timing of Section 408 and 404/10 authorizations. This application will include a draft compensatory mitigation plan. DWR may determine the project phases for CM1 using factors such as, but not limited to, construction sequencing and location of work sites. A wetland delineation for entire project area must be submitted in accordance with the *Corps of Engineers Wetlands Delineation Manual*, January 1987, and the appropriate regional supplement.

## **Application Review**

When the complete application is received, a public notice will be issued describing CM1 and its phases, as well as the Corps approach for making permit decisions under CWA 404/RHA 10. Any phases presented to the Corps with detailed, project-level of information shall be included in the CM1 public notice. The Corps may require additional information, and consultation may be required for compliance with Section 106 of the National Historic Preservation (NHPA) and ESA.

## **Preliminary LEDPA Concurrence**

DWR will submit to the Corps information on practicable alternatives under the 404(b)(1) guidelines for the entire CM1 project. Subsequently, the Corps intends to make a preliminary determination regarding the Least Environmentally Damaging Practicable Alternative (LEDPA) under the 404(b)(1) for CM1 that meets its overall project purpose. Project phases and related timing of the 404/10 and Section 408 authorizations will be acknowledged in this step.

## **Preliminary Concurrence on Final Mitigation Plan**

DWR will submit to the Corps a final compensatory mitigation plan to offset unavoidable impacts to waters of the U.S. for CM1. If the Corps finds the final plan is acceptable, the Corps intends to make a preliminary determination regarding the acceptability of the compensatory mitigation for impact to aquatic resources, in accordance with 33 Code of Federal Regulations (CFR) Part 332, Compensatory Mitigation for Losses of Aquatic Resources.

## **Decision Process**

For each phase of CM1, the Corps will issue a public notice that includes detailed, project-level information. The Corps will prepare a decision document (EA FONSI or ROD) and will make any necessary additional findings regarding NEPA compliance, the CWA Section 404(b)(1) analysis, public interest review, and Section 408 permission, if applicable.

## **Subsequent Phases**

DWR would submit separate permit applications for each phase. Project phases may require additional

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NEPA documentation; NHPA and ESA compliance must be demonstrated for each phase. A public notice would be issued for each phase requiring a Standard Permit. For each subsequent phase the Corps will prepare a decision document. The decision document includes findings on NEPA compliance, the CWA Section 404(b)(1) analysis, public interest review, and Section 408 permission, if applicable. The processing of the request for each phase could occur in sequence or concurrently.

**NOTE:** This document is a working draft subject to change and will be updated periodically as new information becomes available.

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